No. 17318

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the United States.

BRIEF OF PETITIONERS JOE GOLDSTEIN AND LILLIAN GOLDSTEIN.

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TOPICAL INDEX

PAGE

Jurisdictional statement 2

Statutes involved 3

Questions presented 3

Specifications of errors relied on 3

Statement of case 4

Argument 9

1. Transaction properly taxable as capital gain 9
   Taxing statutes applicable 11

Conclusion 23

TABLE OF AUTHORITIES CITED

Cases

Cases	Page
Bastanchury, In re, 66 F. 2d 653	9
Brown, Warren H., 27 T. C. 34	19
Bryan v. Swofford, 214 U. S. 279	9
Central Trust v. Bridges, 57 Fed. 753	10
Erie v. Tompkins, 304 U. S. 65	9
Garretson v. Pacific Crude Oil, 146 Cal. 184	10
Langhorn v. Bank of America, 88 F. 2d 551	9
Naify v. Pacific Indemnity Co., 11 Cal. 2d 5, 76 P. 2d 663, 115 A. L. R. 476	12
Phillips v. Sanger Lumber Co., 130 Cal. 431	10
Smith v. Pacific Bank, 137 Cal. 363	10
Sullivan's Estate v. C. I. R., 175 F. 2d 657	9
Sun Properties v. United States, 220 F. 2d 171	13, 19
Ward v. Commissioner of Internal Revenue, 224 F. 2d 547	9

Statutes

Statutes	
Civil Code, Secs. 2295-2300	12
Corporations Code, Sec. 820	10
Internal Revenue Code of 1939, Sec. 115(a)	3
Internal Revenue Code of 1939, Sec. 117(a)(2)	3
Internal Revenue Code of 1939, Sec. 117(o)	12
Internal Revenue Code of 1954, Sec. 1239	12
United States Code, Title 26, Sec. 6213	2
United States Code, Title 26, Sec. 7442	2
United States Code, Title 26, Sec. 7482(a)	2
United States Code, Title 26, Sec. 7482(b)(1)	2

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The Petition for Review [Tr. 32, 33]* seeks to review a decision of the Tax Court of the United States wherein the Tax Court determined, that the gain arising on the sale of non-depreciable real property reported by the taxpayers as a short term capital gain was in fact a dividend. As a result of this determination the taxpayers were not permitted to offset the gain against a capital loss carry-over credit, adjustments were made to the amount of medical deduction allowable, and it was determined that the taxpayers owed a deficiency of $28,404.13.

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*Reference prefixed with "Tr." refer to the transcript of record herein.

Jurisdictional Statement.

1. The Jurisdiction of the Tax Court is provided in Title 26, U. S. C., Sections 7442 and 6213 under which a taxpayer may appeal to the Tax Court of the United States a proposed deficiency in income taxes.

2. The jurisdiction of this Court upon appeal to review the judgment of the Tax Court is found in Title 26 U. S. C., Section 7482(a) which provides that the United States Courts of Appeal shall have exclusive jurisdiction to review the decisions of the Tax Court. Venue of this review is in the Court of Appeals for the Ninth Circuit by reason of the fact that the petitioners are residents of the Southern District of California and filed their joint income tax return for the calendar year 1953 (the year herein involved) with the Director of Internal Revenue at Los Angeles, California. Title 26 U. S. C., Section 7482(b)(1) provides that venue for review shall be in the United States Court of Appeals for the circuit in which is located the office to which was made the return of tax in respect of which the liability arises.

3. The pleadings necessary to show the existence of jurisdiction:

(a) The 90-day Letter of the Commissioner, and attached statement of liability [Tr. 9-13].

(b) Petition of the Taxpayers [Tr. 5-9].

(c) The respondent's Answer to the Petition [Tr. 13, 14].

(d) Stipulation of Facts [Tr. 15-18].

(e) Memorandum of Findings of Fact and Opinion of the Tax Court [Tr. 19-30].

(f) Decision of the Tax Court [Tr. 31].

(g) Petition for Review [Tr. 32, 33].

Statutes Involved.

Section 115(a) of the Internal Revenue Code of 1939 as amended provides as follows:

> ". . . The term 'dividend' when used in this chapter . . . means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913 or (2) out of the earnings or profits of the taxable year. . . ."

Section 117(a)(2) of the Internal Revenue Code of 1939 as amended provides as follows:

> ". . . The term 'short-term capital gain' means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income;"

Questions Presented.

1. Whether for tax purposes the gain on the sale of a single parcel of real estate, exclusive of any improvements thereon, to a corporation of which the taxpayers own directly or hold in trust for minor children 2906 shares out of a total of 5500 shares outstanding, constituted a dividend or a short-term capital gain.

Specifications of Errors Relied on.

1. Tax Court erred in its determination of facts and the conclusions of law to be drawn therefrom.

2. The decision of the Tax Court is contrary to law.

Statement of Case.

The petitioners herein are now and were at all pertinent times husband and wife, residing in Los Angeles, California [Tr. 15]. A timely return for the calendar year ending December 31, 1953, was filed with the District Director of Internal Revenue for the Los Angeles District [Tr. 15; Ex. 1-a]; that on the return as filed the petitioners reported a short-term capital gain from the sale of real property for $75,000.00 upon which real property, after deducting cost of $35,000.00 gain of $40,000.00 was returned. This gain was offset against a capital loss carry-over [Ex. 1-a]. The Commissioner of Internal Revenue, in his Notice of Deficiency, determined that the $40,000.00 referred to above constituted the distribution of a dividend from the purchaser of the property (Boys' Market, Inc.) and was therefore taxable as ordinary income [Tr. 12], thus, the carry-over capital loss credit was not applicable.

As developed by the evidence presented before the Tax Court, both oral and documentary, and by stipulation entered into between petitioners and respondent, the facts surrounding the transaction in question were as follows: On and prior to December 27, 1945, the petitioner Joe Goldstein was the sole general partner in a limited co-partnership consisting of himself as general partner and of Edward Goldstein and Joe Goldstein as Trustee for Max Goldstein, limited partners; that said partnership operated under the fictitious name of "The Boys' Market" [Tr. 16]. The business of the partnership was the operation of large supermarkets retailing groceries, meats, vegetables and sundries, located in Los Angeles County, California [Tr. 17].

On September 27, 1945 the co-partnership leased a certain parcel of land situated in the City of San Gabriel, California, from Torley Land Company, a corporation, for a term of fifty years commencing November 1, 1945 [Tr. 16]. The property involved consists of the Southeast corner of Valley Boulevard and Del Mar Avenue in San Gabriel, having 338 ft. frontage on Valley Boulevard and 370 ft. on Del Mar Avenue [Tr. 18]. Among other things the lease provided that the lessee (co-partnership) should pay annual rental of $800.00 together with all taxes, assessments and charges against the property; that the lessee should erect and maintain a building of certain minimum specifications upon said property; that in event of an assignment of the lease that the co-partnership consisting of petitioner Joe Goldstein as general partner, and Edward Goldstein and Joe Goldstein as Trustee for Max Goldstein, limited partners, should remain liable to the lessor or its successors for the performance of all the conditions of the lease, and should be liable for any breach thereof [Ex. 2-b].

The Boys' Market, Inc., a corporation, was incorporated on June 19, 1936, but did not commence business until January 1, 1946, as of which date the assets of the Boys' Market, a limited copartnership, were exchanged for shares of the capital stock of said corporation [Tr. 16]; that among the assets transferred to the corporation was the lease from Torley Land Company of the property previously described [Ex. 3-c], pursuant to which the corporation took possession of the real property and thereafter erected a market building on the property during the year 1948 [Tr. 16, 17].

At the time of the assignment of the lease from the co-partnership to the corporation, the petitioner Joe Goldstein received a letter dated March 28, 1946 from J. Vincent Hannan, attorney for Torley Land Company, advising him that the Torley Land Company specifically did not release the co-partnership from its liability under the terms of the lease [Ex. 7, Tr. 158-160].

At the time the lease was originally negotiated petitioner Joe Goldstein, in behalf of the co-partnership, attempted to purchase the property from Torley Land Company rather than lease it. For that purpose he visited the president of Torley Land Company to negotiate a purchase and sale. At that time Goldstein had in his possession two cashier's checks in the amount of $25,000 and $35,000 respectively, and a third check for $50,000.00. He first offered the $25,000 check without effecting a deal. He then produced the $35,000 check, but when he got through negotiating with it, saw there was no purpose in bringing out the $50,000 check [Tr. 222]. The lease above referred to was then entered into.

In December of 1952 and January, 1953, negotiations were reopened between Joe Goldstein, as president of The Boys' Market, Inc., and Joseph M. Torley, president and principal stockholder of Torley Land Company, relative to the sale by the latter to The Boys' Market, Inc., of the fee of the above referred to property [Tr. 165-168]. These negotiations were duly reported by Goldstein to his corporation and were recorded in its Minutes of January 27, 1953 [Tr. 45, 46; 168]. As stated in the Minutes, it was the desire of the directors of the corporation to purchase the land in order that a loan might be secured on the entire property (consisting of the land (owned by Torley) and the improvements (owned by the corporation)).

It developed that the Torley Land Company refused to sell its interest in the fee for cash, but would only negotiate on the basis of an exchange for real property to be located in Las Vegas, Nevada [Tr. 169-170; 279-284]. This turn of the negotiations was reported by the petitioner to the board of directors and officers of the corporation [Tr. 49, 50]. The directors thereupon determined that in behalf of the corporation, they were not interested and would not enter into a transaction involving the acquisition of property in Las Vegas, Nevada, under any circumstances [Tr. 50-54; 109-111; 133-134; 170-172]. Thereupon, at a meeting of the board of directors on April 28, 1953 the petitioners were authorized by the board of directors to buy the land in San Gabriel as their private property [Tr. 46, 47].

The petitioners herein then took over negotiations with the Torley Land Company in their individual behalfs and, on June 22, 1953, entered into escrow agreements with the Torley Land Company wherein the petitioners undertook to acquire a certain parcel of real property in the City of Las Vegas, Nevada, and to erect thereon an apartment house at a total cost of $35,000.00, to be exchanged for the fee to the real property in San Gabriel subject to the lease thereon to the Boys' Market [Ex. 8]. The petitioners then advanced $35,000.00 of their own funds; the property in Las Vegas was acquired; the apartment house was constructed thereon; and on December 8, 1953 the exchange was completed [Exs. 6, 8; Tr. 178, 179]. Immediately thereafter the petitioners offered to sell the real property to the lessee at its fair market value. Investigation was then undertaken by two of the directors to ascertain a fair price to be paid for the property. Edward Eddy, a director and secretary-treasurer, made inquiries through the Bank of America as to fair market value of the land, and was advised that $75,000.00 was a fair price [Tr. 58, 59]. Max Goldstein, also a director and vice-president, obtained a corroborating appraisal from a local real estate man [Tr. 135, 136]. The corporation thereupon purchased the property from the petitoners for $75,000.00.

An independent appraiser produced at the trial, set the fair market value of the property in question at $79,600.00 as of December, 1953, and expressed the opinion, based upon examination of the property, the policy of title insurance [Ex. 6] and the lease existing on the property prior to sale [Ex. 2-b] that $75,000.00 was a fair price [Tr. 88-95].

ARGUMENT.

1. Transaction Properly Taxable as Capital Gain.

The transaction whereby the petitioners acquired the land in question and subsequently sold it to the corporation, is neither void nor voidable, despite the fact that they were the owners directly or in trust of 52.8 per cent of the stock of the corporation.

Under the federal decisions, the statutes and decisions of the State of California are controlling and govern the contractual relations as between the petitioners and the corporation.

> *Erie v. Tompkins,* 304 U. S. 65;
>
> *Langhorn v. Bank of America* (9 C. A.), 88 F. 2d 551, 553;
>
> *In re Bastanchury* (9 C. A.), 66 F. 2d 653, 656;
>
> *Bryan v. Swofford,* 214 U. S. 279.

Where taxable situations arise from relations entered into under state law, the nature of such relationship and the rights of the parties under the state law must be kept in view in determining the incidence of federal taxation.

> *Ward v. Commissioner of Internal Revenue* (9 C. A.), 224 F. 2d 547.

That which constitutes an interest in property held by a person within a state is a matter of state law as respects liability to federal taxation.

> *Sullivan's Estate v. C. I. R.* (9 C. A.), 175 F. 2d 657.

In measuring the transaction occurring between the petitioners and their corporation, it is therefore essential to first determine the California law with relation to the transaction. The California Corporations Code provides that if a corporation is properly represented by other officers, a transaction between an officer or director and the corporation is not even voidable unless fraud against the corporation is shown.

Cal. Corp. Code, Sec. 820.

A contract entered into by an officer of a corporation to his own advantage and in violation of his trust, is not ordinarily void but is only voidable at the option of the corporation or its stockholders who are the beneficiaries.

Phillips v. Sanger Lumber Co., 130 Cal. 431.

But, if at the time of the transaction the directors are the only stockholders, the transaction is neither void nor voidable.

Garretson v. Pacific Crude Oil, 146 Cal. 184;
Smith v. Pacific Bank, 137 Cal. 363.

The above principles are not only recognized in California, but similar principles are recognized by the Federal Courts. For example, in *Central Trust v. Bridges,* 57 Fed. 753, 767, the Court states:

> "There is no law which makes it impossible for a majority stockholder to enter into a contract with his company. *Wright v. Railway Co.,* 117 U. S. 72. As already explained, the company may appeal to a court of equity to set such contract aside, if it is unfair or unconscionable, for fraud or undue influence; but until this is done the contract expressed the true relation between the parties."

It would thus appear that as between the petitioners herein and the corporation, that the sale of the real property to the corporation is neither void nor voidable, and therefore could not be construed by the parties to the transaction as representing payment of dividends or a contribution of capital, nor anything other than a purchase and sale of real property.

Taxing Statutes Applicable.

The question, however, would then become whether or not the Commissioner of Internal Revenue can disregard the bona fides of the transaction and treat the transaction as not a sale but purely a device wherein and whereby the corporation was able to divert a portion of its earnings to the petitioners in the form of a secret and preferred dividend. To achieve this result it was the contention of the Commissioner, by his adoption [Tr. 11] of the Report of Examination of the Revenue Agent [Ex. 4-d] that the petitioners were in fact the agents of the corporation in acquiring the land from Torley Land Company. In this connection, it is interesting to note that the examining revenue agent never inspected the records of the corporation, nor questioned the petitioners or the other officers or directors of the corporation concerning the transaction here in question [Tr. 106, 136, 181]. It was this failure which undoubtedly led the revenue agent to predicate his conclusions on the statement that "The corporation should have been given an opportunity to purchase the property, and only upon their refusal or rejection was it proper . . . for the taxpayers to have acted." [Ex. 4-d].

It is clear from the evidence that the petitioners were specifically released from any fiduciary capacity in dealing with the land and it is also clear that they were not dealing as agents for the corporation. Under the law of California (Calif. Civil Code, Sections 2295-2300 inclusive), there are but two types of agencies, namely, actual and ostensible. Ostensible agency is defined as being when the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent when in fact the latter is not employed by him. That, of course, is not the situation here. On the other hand, an actual agency must rest on agreement or consent.

> *Naify v. Pacific Indemnity Co.* (1938), 11 Cal. 2d p. 5; 115 A. L. R. 476; 76 P. 2d 663.

In the instant case, therefore, in view of the action of the board of directors who constituted all of the stockholders, petitioners were clearly not agents.

Actually there is no federal taxing statute discouraging sales of non-depreciable property by an individual to his controlled corporation. In this connection, in 1951 Congress did, by the addition of Section 117 (O) to the Internal Revenue Code (now Section 1239, 1954 Code) deal with the subject of treatment of sale of depreciable property to one's controlled corporation. However, by that section Congress refuses to apply capital gain treatment to a sale of depreciable property to a corporation more than 80 per cent of which was controlled by the transferror, his wife, his minor children, and his minor grandchildren. Thus, even if we were dealing with depreciable property, which we are not in the instant case, the inhibition of that section would not apply to the current situation where the control is but 52.8%.

In the view of petitioners, the situation herein lends itself to the language of the Court in *Sun Properties v. U. S.*, 220 F. 2d 171, ff. commencing on page 173:

> ". . . The holding below is based on the general principle of tax law that the substance of a transaction rather than its mere form controls tax liability related thereto. To be more precise, its rationale is that this was not a customary or usual sort of sale nor the type which would have taken place between parties at arm's length; the decisive consideration motivating the transaction was the minimizing of taxes; and, in fact, that was the only business purpose of the transaction Therefore, the court reasoned, it was not a sale at all; and since the increase in assets of the corporation, if not offset by a corresponding increase in liabilities or debts of the corporation, represents an increase in capital, the transaction was in substance an increase in capital. One other consideration which undoubtedly influenced the holding was that this was a 'thin' corporation; that is, one with an unusually high ratio of debts to capital on its books.
>
> "This rationale is perilously plausible. It is in effect saying to the taxpayer, 'You did this under suspicious circumstances; therefore, you did not do it at all, and you are not entitled to any tax advantages.' For all of the circumstances relied upon by the Government are consistent both logically and empirically, we think, with the opposite conclusion that the transaction was a sale in fact as well as in form; these are good reasons to scrutinize the transaction carefully, but they

are not rational proof that it was something other than what it purported to be.

"Let us consider first the argument that the transaction was not of the arm's-length sort. We think the law is as it is stated in Prentice-Hall, Federal Taxes Sec. 28,205:

> 'One of the circumstances which may cause the test of substance v. form to be applied is that the transaction involved was not an arm's length transaction * * *. The fact that a transaction was not at arm's length has apparently not of itself been a basis for disregarding the transaction but it does raise the question of whether the substance is the same as the form.'

"Indeed, we think it may be stated as a general rule that a transaction must not be disregarded simply because it was not at arm's length. *Staab,* 20 T. C. 834. And we think it would be judicial legislation of the most inexcusable kind for a court to create such a rule.

"Likewise, the argument that the transaction was not done in the customary manner must go by the board. We know of no general requirement that transactions be entered into in a conventional way for them to be recognized as having the usual tax result. At most, this is only another reason to view the transaction closely for indicia of a different sort of transaction; it is not itself an indicium here of a capital transfer or of a sale, for we may take judicial notice that there are many kinds of capital transactions as well as many debtor-creditor transactions and sales which are highly unconventional. See *Stevens, Corporations* (2d Ed.) 414-418.

"What about the fact, which we may assume to be true that Peacock's predominant motive was to minimize taxes? In *Gregory v. Helvering,* 293 U. S. 465, 469, 55 S. Ct. 266, 79 L. Ed. 596, 97 A. L. R. 1355, the Supreme Court said that a motive of tax avoidance will not establish liability if the transaction does not do so without it. It may fairly be said that a tax avoidance motive must not be considered as evidence that a transaction is something different from what it purports to be. 8th Ann. *N. Y. U. Institute on Federal Taxation* 990, 1003:

> 'Transactions are properly subject to careful scrutiny when the only ascertainable motive is tax avoidance, just as they are subject to scrutiny when between the members of a family. the error into which the courts have fallen, however, is that they have elevated the rule of careful scrutiny into a rule which changes the substantive effect of the evidence found. Although transactions like these should be carefully studied they should be treated, for tax purposes, on the basis of this careful study, just like tax cases where tax avoidance is not a motive.'

"And we said in *Montgomery v. Thomas,* 146 F. 2d 76, 81:

> 'the general rule is in accord with that expressed in *Johnson v. Commissioner of Internal Revenue,* 2 Cir. 86 F. 2d 710: "Legal Transactions cannot be upset merely because parties have entered into them for purpose of minimizing or avoiding taxes which might otherwise accrue." '

"Nor does the fact that this transaction may not have had any business purpose other than saving taxes, rationally imply that it was not a sale. No cases require that a sale have any business purpose beyond that of realizing a capital gain. See *Hobby,* 2 T. C. 980:

> 'The Commissioner argues that petitioner did not in fact sell, or may not be regarded as having sold, the shares. He says that this is because the alleged sale 'had no business purpose.' What kind of 'business purpose' must be shown as necessary to the recognition of a sale is not made clear, and there is no statutory requirement to that effect. The question is not one of purpose, but whether the transactions were in fact what they appear to be in form. *Chisholm v. Commissioner,* (2 Cir.) 79 F. 2d 14. It is true that the sales were made at times when their effect would be to avoid the impact of the forthcoming redemption and the resulting tax. Petitioner, a shareholder, had an unrealized increment in his shares which he wanted to realize. Collaterally he wanted to use a legitimate transaction which would impose upon him the least tax. This is not an interdicted purpose. The primary purpose to realize the gain was a legitimate business purpose, even though it also had a collateral favorable tax effect.'

"On the other hand, where the issue is the recognition of a corporate reorganization, *Gregory v. Helvering,* supra, or of a one-man corporation as a separate entity, *Higgins v. Smith,* 308 U. S.

473, 60 S. Ct. 355, 84 L. Ed. 406, or of a sale and leaseback arrangement, *Shaffer Terminals, Inc. v. Commissioner,* 9 Cir., 194 F. 2d 539, the existence of an independent business purpose may be very important. However, we would be most reluctant to impose a court-made requirement of a business purpose independent from taking a gain or loss, in determining the genuineness of sales in general, since it is common knowledge that vast numbers of sales have been made and are still being made for the purpose of taking gains and losses at times which provide the optimum tax benefits.

"As for the circumstance that taxpayer is a 'thin corporation,' we do not think this is any ground to infer that this transaction was a contribution to capital. Having treated this matter fully in *Rowan v. United States,* No. 15,167, we think it unnecessary to repeat what we said on that point.

"So, having scrutinized the transaction closely, as we were bound to do, we find not a particle of proof that it was in fact a contribution to capital nor that it was intended as such. Evidence which may tend to prove that a transaction was a contribution to capital may be of many sorts. We enumerated some of them in the *Rowan* case, supra; that payments of cash were made for the acquisition of capital assets; that certificates of stock were issued; that repayment was subordinated to other indebtedness; that the maturity date is inordinately postponed; that the parties agree not to enforce collection; that 'interest' is to be paid out of earnings only; or that cash advances are made to commence the corporate life. See also *Stevens, Corporations* (2d Ed.) 415-418, where in addition to these factors, the granting of voting power to so-called creditors and the absence of a fixed maturity date of a 'debt' are cited as indicia of a capital contribution rather than a loan or sale. The absence here of any provision for interest does not seem to us to be an indication that this was not a sale, particularly where Peacock was the sole stockholder; the purchase price in a sale can of course be stated in a lump sum payable in installments without differentiation of principal and interest, or for that matter, without interest.

"On the other hand, the provision for fixed payments without regard to corporate earnings in the present case is evidence that a debt actually was created. The language of the document and the book entries are further evidence that a sale took place. *Welp v. United States,* 8 Cir., 201 F. 2d, 128, 131. This is sufficient evidence to rebut the presumption of correctness with which the Commissioner's determinations are clothed, and the trial court was clearly wrong in finding that the transaction was a contribution to capital and not a sale.

"Furthermore, the taxpayer cites two Tax Court cases which it says squarely support its contention that the transaction was a sale which entitled it to a higher tax basis. It seems to us that those cases are in point and that the Government has not succeeded in distinguishing them. *Herff &*

Dittmar Land Co., 32 B. T. A. 349, Acq. XIV-2 C. B. 10; *Hollywood, Inc.* 10 T. C. 175. Acq. 1948-1 C. B. 2. The case of *Curran v. Commissioner,* 8 Cir., 49 F. 2d 129, also supports our decision. There the transaction was given effect as a sale even though payment for the property was denominated a 'dividend,' and there was no written contract of sale. We also consider it significant that Congress has since amended the Internal Revenue Code for the manifest purpose of preventing further use of this very method of reducing taxes; that the Commissioner has acquiesced in the *Herff* and *Hollywood* cases, supra, and that many taxpayers may have relied on these decisions. The policies underlying the *stare decisis* principle are especially important where there may have been such reliance, and they alone would be enough to sustain our present holding in the absence of any cases to the contrary." (Footnotes omitted.)

For a further extension of the principles enunciated in the *Sun Properties* case, *supra, Warren H. Brown,* 27 T. C. 34, wherein the Tax Court follows the holding in the *Sun Properties* case, *supra,* with respect to a situation wherein the Commissioner of Internal Revenue attempted to treat payments received by the taxpayers on the sale of certain property as being in the nature of dividends, rather than the sale of capital assets.

While it is not conceded that the motives of the directors in declining to deal in behalf of the corporation with Torley Land Company inasmuch as the transaction involved acquisition of property in Nevada, are material, nevertheless, so long as those reasons were the independent determination of the directors acting within the scope of their duties and were arrived at for what they considered to be valid business reasons, they cannot now be questioned by the Commissioner, even though if he had been a director he might have voted differently. The fact that the Goldstein brothers other than Joe had such an antipathy toward Las Vegas by reason of their past experiences in that city and their inability to resist the lure of gambling, while possibly not attractive to the judge trying the case were nevertheless real objections in their own minds and constituted a valid reason for not desiring to enter the transaction. As to the secretary-treasurer, Eddy, his reasons which he also impressed upon the others, were what he considered a strong possibility of an interpretation that the corporation might be termed as being in inter-state business and therefore subjected to certain inhibitions with reference to other affairs of the corporation, and further that the transaction could well be questioned by the financial institution who had extended an open line of credit to them, in that such transaction might be construed as contrary to the negative covenants of their agreement. It is true that a lawyer might or might not have interpreted the effect of the transaction in a different light than Mr. Eddy did, but these were his reasons arrived at in the exercise of his judgment as secretary-treasurer and a director of the corporation and were entitled to the respect of the other directors. Mr. Eddy's good faith in arriving at such conclusions has not been questioned by anyone including the Judge of the Tax Court, although he expressed doubt as to their validity.

So far as Joe Goldstein was concerned, he had a strictly personal reason for wanting to acquire the real property from the Torley Land Company, entirely aside from whether the corporation ultimately purchased it from him or not. That was the fact as stated by him and not contested that in connection with the planning of his estate he had been advised by his attorney and by his estate advisors that as the former general partner of the Boys Market, a co-partnership, he or his estate were liable so long as the lease existed between Torley and any successors to the co-partnership. He was therefore determined to clean up this loose end of his affairs in order that in the event of his death his estate could be administered and closed in due course and not remain liable for a period, as it then existed, of some forty years for any breach of the lease.

There can be no doubt that the entire transaction was entered into in good faith by all of the parties concerned. Petitioners did not move to acquire the property for themselves until the proposition had first been offered to the corporation and refused by it, and they had been specifically authorized to deal in their private capacities. After acquiring the property they then offered it to their corporation in order that the corporation might then achieve its desired goal of merging the lease and the real property so as to release their invested funds into their working capital. In offering the property to them, he did so by suggesting that they ascertain the fair market value and pay him that amount. Independent investigation undertaken by two of the directors established that $75,000.00 was a fair price and that was the amount for which the deal was settled. This price was substantiated by subsequent determination made by a qualified independent appraiser who took into consideration all of the factors concerning the property including the fact of the outstanding lease.

While the Government did not produce proof to offset that offered by the petitioners as to the fair market value of the property for the purpose of demonstrating the fairness of their dealings with the corporation, nevertheless the Tax Court chose to scout the valuation of $75,000.00. In this regard it was pointed out that Goldstein had not been willing originally to pay more than $35,000.00 and would not have paid more than $35,000.00 for the property, thus surmising that that amount represented the fair market value of the property. However, the evidence showed that as early as 1942 when originally the lease was signed, Goldstein was prepared to offer $50,000.00 for the property, but refrained from doing so when he found that Torley was not interested in selling. Since that time and shortly before the acquisition of the property by petitioners, major developments greatly increased the value of the property. As pointed out by the appraiser who was familiar with the property at the time and who had participated in behalf of the public agency involved, Del Mar Avenue in 1949 and 1950 and upon which the property abutted, had been widened, extended, and had become a major artery. The fact that an offer was made in 1942 for $35,000.00 but with intent to increase the bid to $50,000.00 if necessary, is in no way derogatory to the conclusion that $75,000.00 was a fair value in 1953.

No weight was apparently given by the Tax Court for the financial costs and risks assumed by the petitioners in acquiring and building the Las Vegas property. If loss had been occasioned, the burden would have fallen upon them exclusively.

Conclusion.

It is respectfully submitted that the transaction in question was properly reported by the petitioners on their income tax return for 1953. Therefore, the decision and judgment of the Tax Court of the United States should be reversed.

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Attorney for Petitioners.